APPEAL NO. 93170

On February 3, 1993, a contested hearing was held in (city), Texas, with (hearing officer) presiding. This case had been transferred to the field office from (city) at the request of the claimant.

The central issue in this appeal is whether or not there was an agreement to designate a doctor in compliance with the requirements of Tex. W.C. Comm'n, TEX. ADMIN. CODE § 130.6 (TWCC Rule 130.6). The appellant (claimant) contends there was not, while respondent (carrier) claims there was. The hearing officer held that there was substantial compliance with Rule 130.6 in agreeing to a designated doctor, and this substantial compliance was sufficient to give the doctor's opinion the full weight accorded to the opinion of an agreed designated doctor in determining maximum medical improvement (MMI) and impairment.

DECISION

After reviewing the evidence we reverse the decision of the hearing officer and remand for further development and consideration of the evidence in order to resolve the issue of whether, and when the claimant attained MMI and what, if any, permanent impairment he may have. We take such action because we hold that the evidence in the record does not establish that (Dr. C) was an agreed designated

doctor at the time of his examination of claimant in accordance with the rules promulgated by the Texas Workers' Compensation Commission (Commission) to implement the 1989 Act, TEX. REV. CIV. STAT. ANN. arts. 8308-4.25 and 4.26 (Vernon Supp. 1993) (1989 Act).

The claimant alleges an injury to his back and neck on September 15, 1991, when he lifted and emptied a cart full of bottles. While claimant was initially treated at Waco by a (Dr. P), (Dr. St) of Waco became his treating physician. On February 11, 1992, appellant saw (Dr. Sa), another Waco physician, pursuant to a request for medical examination order by carrier. Dr. Sa stated on a TWCC-69 form that appellant reached MMI on February 12, 1992, and rated the claimant's whole body impairment at five percent. Both claimant and Dr. St were sent a copy of Dr. Sa's TWCC-69 form by carrier and Dr. St did not agree with Dr. Sa on the certification of MMI.

Claimant notified the Commission field office in Waco and the carrier that he intended to dispute the certification of MMI and the impairment rating rendered by Dr. Sa. Claimant testified that he spoke to (Ms. O) at the Waco office of the Commission. Ms. O is the head of the Review Section in the Waco field office of the Commission. Appellant states that Ms. O told him to call the carrier and make an agreement to see another doctor.

Claimant further testified that he called the adjuster handling his claim and discussed going to another doctor. Claimant contends that the handling adjuster then

stated that he knew a doctor in Dallas to whom he wanted to refer the claimant. Claimant states that he then told the adjuster that he didn't mind seeing this doctor as long as he treats me fairly. The adjuster then made an appointment for claimant to see Dr. C, a Dallas physician.

Prior to his appointment claimant called Dr. C's office to confirm and was told that his appointment had been cancelled. Claimant called Ms. O to tell her of the cancellation, and she told him that she would call the handling adjuster and find out why the appointment had been cancelled. The handling adjuster then called claimant and told claimant he would reschedule his appointment with Dr. C.

Dr. C saw claimant on June 30, 1992, and stated on a TWCC-69 form that claimant had reached MMI on June 30, 1992, and had a zero percent impairment rating as a result of his injury. At this point claimant requested a benefit review conference and one was held on September 25, 1992. Claimant was unrepresented by counsel until some time
after this benefit review conference when he hired , of Dallas, who represented claimant at the contested case hearing and represents him in this appeal.

Claimant testified that prior to agreeing to see Dr. C he was not told that if he did not agree to a designated doctor the Commission would have designated a doctor for him to see. Claimant also testified that had he known this he would not have seen Dr. C. Claimant further stated that he never spoke to the ombudsman prior to agreeing to see Dr. C. Claimant's testimony in regard to these matters is undisputed.

While there was evidence, again through the testimony of the claimant, that there was a record of his telephone conversations with Ms. O in her computer, there is no evidence he was ever advised by her or anyone else that an ombudsman was available to explain the contents of the agreement for a designated doctor. While the record is unclear as to when claimant knew of the existence of the ombudsman, (Ms. A), he stated he never spoke to Ms. A until after his appointment with Dr. C. The claimant also testified that he did not remember receiving any writing from either the carrier or the Commission concerning his appointment with Dr. C.

At the contested case hearing, a TWCC-69 from Dr. St was admitted into evidence. This form showed that Dr. St's opinion was that the claimant reached MMI on January 11, 1993, and had a nine percent impairment rating as a result of his injury.

Claimant contends that in the present case the Rules of the Commission were not followed in agreeing to a designated doctor. Carrier submits that the Rules were sufficiently followed. The hearing officer states, "[w]hile it is clear that many of the requirements of that rule (Rule 130.6 of the Rules of the Texas Workers' Compensation

Commission) were not followed by the Carrier and the commission, it is also clear that there was substantial compliance with the rule."

Rule 130.6 of the Rules of the Commission states in relevant part:

Rule 130.6: Designated Doctor: General Provisions

(a)If the commission receives a notice from the employee or the insurance carrier that disputes either maximum medical improvement or an assigned impairment rating, the commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee.

(b)After notifying the employee and the insurance carrier, the commission shall allow the employee and the insurance carrier ten days to agree on a designated doctor. The commission shall inform an unrepresented employee that an OMBUDSMAN is available to explain the contents of the agreement for a designated doctor.

(c)If the employee and the insurance carrier agree on a designated doctor, the carrier shall, within ten days, send a confirmation letter to the employee, with a copy to the commission, The letter shall include:

(1)the workers' compensation number assigned to the claim by the commission;

(2)the employee's name, address, and social security number;

(3)the date of the injury; and

(4)the designated doctor's name, business address, and telephone number, and the time and date of the examination.

(d)The commission shall contact the worker to confirm the agreement. If the commission is not notified by the tenth day that an agreement has been reached, the commission shall issue an order directing the employee to be examined by a designated doctor chosen by the commission. The examination shall be held within a reasonable time after the order is made. The order shall specify the name, business address, and telephone number of the designated doctor, and the date and

time of the examination. . . ."

In the present case, Rule 130.6 was violated in numerous ways. First, all the evidence at the hearing indicated that once aware that a dispute existed as to MMI and impairment by the claimant, the Commission failed to notify the employee and the carrier that a designated doctor would be directed to examine the employee. Further, even though claimant was unrepresented, the undisputed evidence is that the Commission failed to inform him of the fact an ombudsman was available to explain the contents of the agreement for a designated doctor. All the evidence in the record indicates that the carrier failed to confirm the agreement to see the designated doctor in writing.

As this Panel stated in our decision in Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992:

> While an agreement on a designated doctor need not be a signed contract, Rule 130.6(c) plainly requires that any verbal agreement be memorialized in a written letter of confirmation. . . .
>
> Such extra safeguards were apparently deemed necessary by the Commission, because an agreed designated doctor's report will, according to Art. 8308-4.26(g), conclusively bind the parties to the impairment rating, and prevent the Commission from considering medical evidence to the contrary.

In that case, as in the present one, it was uncontroverted that the claimant had seen a doctor suggested by the carrier. The question, just as in the present case, was whether the claimant had agreed merely to examination by the doctor or had agreed that the doctor would be a designated doctor. Included as part of this argument was the unavailability of an ombudsman to explain the contents of an agreement for a designated doctor. In Appeal No. 92511, *supra*, we held that the doctor would not be considered a designated doctor stating:

> Our insistence upon compliance with the very simple procedures set out in Rule 130.6 is not elevation of form over substance; it is the very means to preserve the designated doctor's status as the impartial decision maker, and, not incidently, his/her immunity from liability, under Art. 8308-8.05. As this case illustrates, expediency and excess of informality in the short term can ultimately prolong resolution of issues that are in both parties' interest to conclude.

Appeal No. 92511 was later followed in both Texas Workers' Compensation Appeal No. 92594, decided December 21, 1992, and Texas Workers' Compensation Appeal No. 92608, decided December 30, 1992. In Appeal No. 92608, an unrepresented claimant

contended that she had agreed to see a particular doctor but did not understand that this doctor was to be a designated doctor. The claimant also contended that neither the carrier nor the Commission explained to her what a designated doctor is, nor did anyone tell her that a Commission ombudsman was available to explain the role of a designated doctor. The carrier presented evidence that the handling adjuster had in fact advised claimant upon the procedure and effect of agreeing to a designated doctor. The Appeals Panel upheld the decision of the hearing officer that there was no designated doctor.

These cases are distinguished from Texas Workers' Compensation Appeal No. 92312, decided August 19, 1992, wherein it was held that there was sufficient evidence to support the hearing officer's determination that there was an agreed designated doctor. In that case there were at least three letters in the record that were sent to claimant's attorney that refer to the doctor in question as the designated doctor. In that case the Appeals Panel stated:

> As noted by the hearing officer, the procedures undertaken by the parties as evidenced by the documents in the record parallel those set forth in Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE § 130.6 (Rule 130.6) with respect to selection of a designated doctor. While we are concerned that there is no direct evidence whether persons from the Commission verified the existence of the agreement as provided for in Rule 130.6(d), it does not appear that Dr. R was appointed by a Commission order as would have been the case absent an agreement.

Thus by both its terms and prior Appeals Panel decisions, one purpose of Rule 130.6 is to provide information to the parties prior to an agreement to designate a doctor. In the case of an unrepresented employee, whose access to legal information is presumably less than that of a represented claimant or a carrier, there is the additional requirement that the unrepresented employee be informed that an ombudsman is available to explain the contents of the agreement for a designated doctor. A purpose of the confirmatory writing requirements of the Rule is to make it easier to prove that the parties had been provided relevant information prior to their agreement to designate a doctor.

In the present case we have an instance where there was not compliance with Rule 130.6, and the undisputed testimony of the claimant is that he did not realize that he was agreeing to have Dr. C be the designated doctor. There is no evidence in the record that the information which Rule 130.6 envisions being provided to the parties was provided to the claimant by any other means. The carrier submits that there is testimony from the claimant that he knew of the existence of the ombudsman prior to his appointment with Dr. C. Yet he testifies he never spoke to the ombudsman prior to seeing Dr. C and there is no evidence anyone explained to him that the ombudsman was

available to explain the contents of the agreement for a designated doctor or that anyone else explained it to him. To charge the claimant with this knowledge merely because he knew of the existence of the ombudsman would be analogous to charging one with knowledge of one's constitutional rights because one knew of the existence of the Constitution.

For the reasons expressed above, the hearing officer's decision is reversed and remanded for further development of the evidence, as appropriate, and consideration of the evidence in order to resolve the issues of whether, and when, the claimant reached MMI, and what, if any, permanent impairment he may have. It might be appropriate that the Commission consider prompt appointment of a designated doctor to resolve the issues. If the parties are unable to agree on a designated doctor, the Commission should direct the claimant to be examined by a designated doctor selected by the Commission in compliance with Article 8308-4.26(5) and Rule 130.6.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge